2006

OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION

COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation; v. New Escalante Irrigation Company : Brief of Appellant

Utah Court of Appeals

Steven E. Clyde; Edwin C. Barnes; James P. Alder; Clyde, Snow, Sessions & Swenson; Attorneys for Appellee/Defendant.

Kay L. McIff; McIff Firm; Richard K. Chamberlain; Chamberlain Associates; Attorneys for Appellants/Plaintiffs.

IN THE SUPREME COURT OF THE STATE OF UTAH

Supreme Court No. 20060942

OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation;

Appellants/Plaintiffs,

vs.

NEW ESCALANTE IRRIGATION COMPANY, a Utah corporation;

Appellee/Defendant.

APPELLANTS' BRIEF ON APPEAL

Appellants/Plaintiffs appeal from an interlocutory order of the Sixth Judicial District Court, the Honorable David L. Mower, Piute County, Civil No. 01060014

Steven E. Clyde Edwin C. Barnes James P. Alder **CLYDE SNOW SESSIONS & SWENSON** 201 South Main Street, 13th Floor Salt Lake City, UT 84111-2216 **Attorneys for Appellee/Defendant**	Kay L. McIff (2193) **THE McIFF FIRM, P.C.** 225 North 100 East Richfield, UT 84701 Telephone: (435) 896-4461 Richard K. Chamberlain (0609) **CHAMBERLAIN ASSOCIATES** 225 North 100 East Richfield, UT 84701 Telephone: (435) 896-4461 **Attorneys for Appellants/Plaintiffs**

IN THE SUPREME COURT OF THE STATE OF UTAH

Supreme Court No. 20060942

OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation;

Appellants/Plaintiffs,

vs.

NEW ESCALANTE IRRIGATION COMPANY, a Utah corporation;

Appellee/Defendant.

APPELLANTS' BRIEF ON APPEAL

Appellants/Plaintiffs appeal from an interlocutory order of the Sixth Judicial District Court, the Honorable David L. Mower, Piute County, Civil No. 01060014

Steven E. Clyde Edwin C. Barnes James P. Alder **CLYDE SNOW SESSIONS & SWENSON** 201 South Main Street, 13th Floor Salt Lake City, UT 84111-2216 **Attorneys for Appellee/Defendant**	Kay L. McIff (2193) **THE McIFF FIRM, P.C.** 225 North 100 East Richfield, UT 84701 Telephone: (435) 896-4461 Richard K. Chamberlain (0609) **CHAMBERLAIN ASSOCIATES** 225 North 100 East Richfield, UT 84701 Telephone: (435) 896-4461 **Attorneys for Appellants/Plaintiffs**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Constitution and Statutes

Page

Page

Other

ADDENDA

STATEMENT SHOWING JURISDICTION OF SUPREME COURT

The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over orders, judgments and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction. Utah Code § 78-2-2(3)(j); *In the Matter of the General Determination of Rights to the Use of Water.* 2004, P.3d (2004 UT 106).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

This appeal raises a single issue of first impression: Can a water right be acquired by seven years of adverse use which commenced prior to but is not completed until after such use was outlawed by the 1939 legislature? The issue was the focus of extensive briefing by both parties. The district court addressed the issue in its Memorandum Decision. *Addendum 4*, 7-16, TR 910-918.

STANDARD OF REVIEW

The district court's determination involved the interpretation and application of various statutes governing the acquisition and forfeiture of water rights under Utah law. "The interpretation of a statute . . . presents a question of law. . . ." *Id.*, ¶ 16, quoting *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶ 4, 53 P.3d 473. "A trial court's determination of law is reviewed under a correctness standard; we afford no degree of deference to a trial judge's determination of the law." Id., ¶ 16, quoting *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶ 9, 79 P.3d 945."

STATUTES RELEVANT TO APPELLATE REVIEW

As a preface to setting forth relevant statutes, I make the following explanation. The statutes governing both the *acquisition* and *forfeiture* of water rights evolved between 1888 and 1939. Much of the evolution was influenced by decisions of the Utah Supreme Court. Such will be discussed during the argument portion of this brief. Relevant provisions of statutes during this time frame are set forth hereafter verbatim, with the full text of the statutes included in *Addendum 5* filed with this brief pursuant to authorization of URAP Rule 24(a) (11). To aid the reader, the statues are organized chronologically and include a comment regarding their relevance to the adverse use claim which is the subject of this appeal.

1888 – COMPILED LAWS OF UTAH, VOLUME II, CHAPTER 11

> § 2780. s 6. A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances:
>
> 1. Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply.
>
> 2. Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years.
>
> § 2783. s 9. A continuous neglect to keep in repair any means of diverting, or conveying, water, or a continuous failure to use any right to water, for a period of seven years at any time after the passage of this act, shall be held to be abandonment and forfeiture of such right.

[RELEVANCE: At this early time in Utah Territory history there existed a statutory basis for acquiring a water right not only by *appropriation (1), but by continuous use (2).* The language relating to *use* is typical of what is known as adverse use. There was also a seven-year forfeiture provision.]

1897 – SESSION LAWS, CHAPTER LII

SECTION 1. The rights to the use of any of the unappropriated waters of the State may be acquired by appropriation.

Sec. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons or ceases to use the water for a period of seven years the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.

Sec. 25. Any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer, shall be deemed guilty of a misdemeanor and shall be liable in damages to any corporation, company or individual injured by such unlawful taking.

[**RELEVANCE**: This is the second session after statehood. The provision for acquiring water right by *adverse use* was not included. The forfeiture provision remained intact; a criminal offense for taking or using water without entitlement was enacted.]

1898 – REVISED STATUTES OF THE STATE OF UTAH

PREFACE. On the admission of the state into the Union it was found necessary to provide for a general revision of the laws. Chapter eighty-five of the laws of eighteen hundred and ninety-six authorized the appointment by the governor of a commission to revise, codify, and annotate the laws of the state. . . . The bill provided, and it was enacted, that it should take effect on January first, eighteen hundred and ninety-eight, that all laws enacted prior to the second regular session of the legislature [1897], saving a few expressly enumerated, should be repealed, and that all other acts of the legislature at its second regular session should have effect as subsequent statutes and as repealing any portion of the revision inconsistent therewith.

TITLE 33. IRRIGATION OF WATER RIGHTS.

1261. **Water right acquired by appropriation.** The rights to the use of any of the unappropriated waters of the state may be acquired by appropriation. [C.L. § 2780*; '97, p. 219.

1262. Id. **Must be for useful purpose. Abandonment.** The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons or ceases to use the water for a period of seven years the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact. [C.L. §§ 2780*. 2783*; '97, p. 219.

1285. **Unlawful taking of water. Penalty.** Any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer, shall be deemed guilty of a misdemeanor, and shall be liable in damages to any corporation, company, or individual injured by such unlawful taking. ['97, p. 225.

[**RELEVANCE**: As stated in the PREFACE, the general revision and codification resulted in the repeal of laws enacted before the second annual session (1897) unless noted. The *appropriation, forfeiture* and *unlawful taking* provisions adopted in 1897 were included and assigned code numbers as shown. The *adverse use* provision was not retained and never again appears in Utah's statutes.]

1903 – SESSION LAWS. CHAPTER 100. WATER RIGHTS AND IRRIGATION.

SECTION 1. **Office of State Engineer**. There shall be a State Engineer, who shall be appointed by the Governor of the State and be confirmed by the Senate. He shall hold his office for the term of four years and until his successor shall have been appointed and qualified. He shall have general supervision of the waters of the State and of their measurements, apportionment and appropriation. . . .

Sec. 34. **Rights to unappropriated water**. Rights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right.

Sec. 35. **Application to be made for rights.** Any person, corporation or association, to hereafter acquire the right to the use of any public water in the State of Utah, shall before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the State Engineer. . . .

Sec. 50. **When right ceases, reversion**. When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public and may be again appropriated, as provided in this act; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.

[**RELEVANCE**: This is the basic appropriation statute which remains in effect. It established the office of the State Engineer and provided that the exclusive means of

acquiring a water right is by application filed with the State Engineer. The "beneficial use" language was shifted from the *forfeiture* provision to the *appropriation* provision.]

1919 – SESSION LAWS

CHAPTER 67. WATER AND WATER RIGHTS.

[forfeiture provision]

Sec. 6. **Nonuse – reappropriation.** When an appropriator or his successor in interest abandons or ceases to use water for a period of *five years*, the right ceases, and thereupon such water reverts to the public, and may be again appropriated, as provided in this Act. [The 1919 change to *five years* has been emphasized by italics.]

[general adjudication provision]

Sec. 20. **Determination of rights.** Upon a verified petition to the State Engineer, signed by five or more water users upon any stream or water source, requesting the determination of the relative rights of the various claimants to the waters of such streams or water source, it shall be the duty of the State Engineer, if upon investigation he finds the facts and conditions are such as to justify, to make a determination of said rights, . . .

[necessity of filing claim]

Sec. 24. **Time for filing and contents of statement.** Each person, corporation or association claiming a right to use any water of said river system or water source shall, within sixty days after the service of such notice mentioned in the preceding section, file in the office of the clerk of the district court, a statement in writing which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following: . . . . [Detailed identification of claimed water right required. . . .]

[consequence for failure to file]

Sec. 29. **Effect of statement – failure to make operates as a bar – proviso as to actual notice.** The filing of each statement by a claimant shall be considered notice to all persons, corporations and associations of the claim of the party making the same, and any person, corporation or association failing to make and deliver such statement of claim to the clerk of the court within the time prescribed by law shall be forever barred and estopped from subsequently

asserting any rights and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; . . . .

[appropriation provision]

Sec. 41. **Acquisition of right to use – purpose – order – more beneficial use.** Rights to the use of the unappropriated public water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. . . . [Same language since 1903.]

[application required]

Sec. 42. **Procedure to acquire right to use unappropriated water.** Any person who is a citizen of the United States or who has filed his declaration to become such, as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in the State of Utah, shall, before commencing the construction, enlargement or extension of any ditch, canal, or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the State Engineer. [Adds language regarding citizenship. Otherwise maintains same application provisions in place since 1903.]

[water commissioners appointed by State Engineer]

Sec. 62. **Water Commissioners and deputies – salary and expenses – suits on same.** Wherever in the judgment of the State Engineer, or the district court, it is necessary to appoint a water commissioner, or deputy commissioner for the distribution of water from any river system or water source, such commissioner or deputy commissioner shall be appointed by the State Engineer.

[enforcement responsibility]

Sec. 64. **Duties of State Engineer – district waters – enforcement of orders and judgments – duties of State Attorneys.** The State Engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this Act. The State Engineer shall divide, or cause to be divided, the water within any district, created under the provisions of this Act, among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and controlled, the use of such water. . . .

[power to arrest and initiate charges]

Sec. 67. **Power to make complaints and arrests.** The State Engineer, or any Water Commissioner, within his district shall have power to arrest any person or persons violating any of the provisions of this Act, and turn such person or persons over to the sheriff of the proper county, and immediately upon delivering any such person or persons so arrested into the custody of the sheriff, it shall be the duty of the State Engineer or Water Commissioner making such arrest to make complaint in writing and upon oath before the proper justice of the peace or to the district court against the person or persons so arrested.

[**RELEVANCE**: Most notable, the period for forfeiture was changed from *seven* years to *five* years (Sec. 6.) Provisions were adopted for a general adjudication (Sec. 20) which immediately thereafter were relied upon in the general adjudication of the Sevier River Basin. Water claimants were obliged to file claims. (Sec. 24.) Failure to file constitutes forfeiture of right (Sec. 29.) The act retained the same language defining the exclusive method of appropriating water. (Sec. 41. and Sec. 42.) State Engineer authorized to appoint water commissioners (Sec. 62) with shared duty to enforce judgments (Sec. 64) and with power to arrest and initiate charges (Sec. 67).]

1933 – REVISED STATUTES OF UTAH

TITLE 100. **WATER AND IRRIGATION.**

100-1-4. **Reversion to Public – By Abandonment or Failure to Use.**

When an appropriator or his successor in interest abandons or ceases to use water for a period of five years the right ceases, and thereupon such water reverts to the public, and may be again appropriated as provided in this title. (L. 19, p. 177, § 6.)

100-3-1. **Only Manner of Acquiring Water Rights.**

Rights to the use of the unappropriated public waters in this state may be acquired by appropriation in the manner hereinafter provided, and not otherwise.

. . .

103-59-1. **Interfering With Control of Water Commissioner.**

Every person who in any way interferes with or alters the flow of water in any stream, ditch or lateral while under the control or management of any water commissioner, is guilty of a misdemeanor. (C.L. 17, § 8514.)

[**RELEVANCE**: The provisions relating to appropriation, forfeiture and the criminal offenses remain essentially unchanged except they were renumbered.]

1935 – SESSION LAWS

CHAPTER 104. **WATER AND IRRIGATION.**

100-1-4. **Reversion to Public – By Abandonment or Failure to Use Within 5 Years – Extending Time.**

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, *unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue to be extended by the state engineer as hereinafter provided.* . . . [Emphasis added to the new language adopted.]

[Extensive language was thereafter included outlining precisely what was required for the applicant to be granted the extension and avoid the forfeiture. If an extension were granted, forfeiture would result for failure to strictly comply. (*See* the attached addendum for the full text).]

100-3-1. **Only Manner of Acquiring Water Rights.**

Rights to the use of the unappropriated public waters in this state may be acquired *only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise.* . . . [Emphasis added to the new language adopted.]

[**RELEVANCE**: The 1935 Legislature significantly strengthened both the *forfeiture* statute and the *appropriation* statute. The forfeiture statute (100-1-4) was amended to allow an extension for non-use beyond five years, but only by filing before the expiration of the five years and by strict compliance with the terms of the extension. The appropriation section (100-3-1) was rewritten so the "application" requirement is specifically included within the *appropriation* section rather than by general reference to other provisions. It was thereby specifically tied to the "*not otherwise*" language which had been in force since 1903. The changes are relevant because they were in force when Defendant claims to have commenced the adverse use on December 1, 1936, the day

following entry of the general adjudication decree (Cox Decree) of the Sevier River Drainage.]

1939 – SUPPLEMENT TO THE UTAH REVISED STATUTES OF 1933

> PREFACE. This supplement brings the laws contained in the 1933 Revision of the Statutes of Utah down to January 1, 1939, with all amendments, additions of new statutes, and repeals indicated.

[**RELEVANCE**: Includes the 1935 amendments and reflects the law in effect when Defendant commenced its claimed adverse use.]

1939 – SESSION LAWS (Passed March 7, 1939. In effect March 20, 1939.)

> 100-1-4. **Reversion to Public by Abandonment or Failure to Use Within 5 Years – Extending Time.**
>
> When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue *is* extended by the state engineer as hereinafter provided. *The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right.* . . . [Emphasis added to the newly adopted language.]
>
> 100-3-1. **Appropriation – Manner of Acquiring Water Rights.**
>
> Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. . . . *No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.* [Emphasis added to the newly adopted language.]

[**RELEVANCE**: Defendant's claimed period of adverse use is seven years beginning December 1, 1936 and continuing through November 30, 1943. The language added to the *forfeiture* provision (100-1-4) makes clear that use by an *adverser* is a nullity. It

would not preclude the necessity of compliance with the requirement to obtain an extension in order to avoid the statutory forfeiture at the end of five years. The amendment to the appropriation provision (100-3-1) makes clear that a water right cannot be acquired by adverse use in any circumstance and that the prohibition applies both to *appropriated* and *unappropriated* water.]

STATEMENT OF THE CASE

The water in question is collected in a remote area on the so-called Griffin Top above the 10,000 foot elevation in the Wasatch Mountains in east Garfield County. Left to its natural course, the water flows into the East Fork of the Sevier River and makes up a portion of the water supply for Plaintiffs and other users in the Counties of Garfield, Piute, Sevier, Sanpete, Juab, and Millard. During the late 1980's, Defendant engaged in some diversion and channeling work on the Griffin Top which was brought to the attention of the State Engineer who issued a cease, desist and restoration directive to Defendant. *See Addendum 1*, TR 41. The work performed by Defendant was designed to carry the water out of the Sevier River Basin and into the Escalante River Drainage which is tributary to the Colorado River. During 1999, and instead of complying with the directive from the State Engineer, Defendant brought in earthmoving equipment creating a major channel with a berm that serves as a dike on the lower side. [1] Both the channel and the dike are higher than a man's head. *See Addendum 2*, TR 76, and *Addendum 3*, TR 81. The extensive earthwork completed by Defendant prompted the filing of the instant lawsuit.

---

[1] Defendant claims this was only "maintenance work" on a water way that had been in existence for over a hundred years. Plaintiffs consider this characterization a gross understatement about the earthwork and an overstatement about the pre-existing condition. This debate, however, is only germane if Defendant's legal theory prevails and a trial ensues.

In the court below, Plaintiffs sought a declaratory judgment decreeing that Defendant had no right or entitlement to the water in question and further seeking an injunction against further diversion or use of the water, damages and an order mandating that the excavation be reversed and the surface revegetated. TR 1, 16-17.

Defendant counterclaimed advancing two causes of action. TR 178, 186. First it claimed a diligence right to water within the Sevier River System based on use prior to 1903 when application to the State Engineer became the sole method for acquiring a water right. During the course of the litigation, Defendant acknowledged that it had failed to file the statutorily required claim to these waters in the general adjudication which resulted in issuance of the so-called "Cox Decree" on November 30, 1936. The district court granted Plaintiffs' summary judgment motion as to this claim holding that the decree adjudicated all of the waters of the "Sevier River System," that Defendant's rights were properly determined in the action and that Defendant had forfeited all rights to the use of water in such system. *Memorandum Decision, Addendum 4*, 6-7, TR 909-10. The decree relied on the statutory language that those failing to advance claims are "forever barred and estopped from subsequently asserting any rights and . . . [are] held to have forfeited all rights to use of said waters theretofore claimed. . . ." *See* Chapter 67, Section 29, *Laws of 1919*, now codified at UCA § 73-4-9.

Defendant's alternate theory of ownership of a water right in the Sevier Drainage is based on the doctrine of adverse use. It claims that one day after entry of the general adjudication decree it commenced using the waters adverse to the interest of those to

whom such waters had been decreed. Defendant claims this adverse use continued for a period of seven years from December 1, 1936 through November 30, 1943.

Plaintiffs' deny both the claimed fact of usage as well as the quantity thereof during the period of time advanced. However, for the purpose of this appeal, and the testing of Defendant's legal theory, Plaintiffs agree that the court may assume that Defendant had the open, notorious and continuous adverse use of some of the water in question during the period from December 1, 1936 through November 30, 1943.

The district court declined to grant Plaintiffs' motion for summary judgment on the adverse use claim, holding that use without right which continued after adverse use was outlawed in 1939 could still count toward the seven years required to vest title. Plaintiffs' appeal is taken from this ruling.

SUMMARY OF ARGUMENTS

When the 1939 legislature put the final nails in the coffin of acquiring a water right based upon adverse user, it was not an isolated all-encompassing occurrence. Rather, it was the culmination of a struggle lasting over four decades; a struggle in which its design to end the dreaded scourge of one person stealing water which belongs to another was not always aided by the judiciary.

During territorial times, acquisition of a water right by adverse use was recognized by statute. This changed the first year following statehood when the legislature dropped the provision recognizing such a right. This was reinforced six years later (1903) when it provided for appointment of a state engineer and adopted an application procedure as the

exclusive method for acquiring a water right. Also, in post statehood legislation, stealing water was treated for what it is – a criminal offense.

For about a quarter of a century, the adverse use issue seems to have been relatively quiet before uncertainty appeared in decisions of the supreme court. This uncertainty reached its apex in 1937 – 1938 in two cases, the lead case being *Hammond v. Johnson*, discussed at length, *infra*. The initial unanimous decision reestablished adverse use (erroneously analyzed as "adverse possession") as a legitimate method for acquiring a water right, and glorified the role of the adverser. When strong petitions for rehearing were filed pointing out the fallacies in the decision, the court pulled back but let the result stand on a three-two vote.

The 1939 legislature responded by closing all loopholes and eliminating all uncertainty that had found its way into the court decisions. The statutory changes were clear, concise and specifically directed to disallow what the court had approved. Since 1939, the unauthorized use of *appropriated* or *unappropriated* water belonging to another produces no right in the adverse user.

On March 20, 1939 when the statutory changes outlawing all adverse use and eliminating any benefit therefrom became effective, Defendants adverse use of the water in question had existed for only 28 of the 84 months required to vest title. Under the amended statutes, any use by Defendant after that date was a nullity. It was considered the same as if the "water ran to waste." Accordingly, Defendant gained no further ground and fell 56 months short of having a vested water right based upon adverse use.

ARGUMENT

I. The Evolution of Utah Statutory and Case Law Reveals an Ongoing Effort by the Utah Legislature To Disallow Acquisition of a Water Right by Adverse Use.

a. Introduction

Beginning the year following statehood, the Utah legislature has charted a consistent course to eliminate acquisition of a water right by adverse use. The supreme court has been less consistent and to some extent may be seen as having impeded the process.

In an earlier section of this brief, Plaintiffs have set forth the relevant statutory provisions beginning with the *Compiled Laws of the Territory of Utah* published in 1888 and continuing through the statutory changes made by the legislature of 1939. Brief comments have been included reflecting the relevance of the statutory changes. The focus in this argument will be on the interplay between the decisions of the supreme court and the evolution of the statutory provisions. The case law will be quoted more extensively, with the statutory changes being quoted only to the extent required to clearly reflect the legislative response to court decisions.

b. 1888 - Territory of Utah

The *Complied Laws of Utah* published in 1888 contained a provision that recognized the "vesting" of a primary water right "whenever any person or persons shall have had the open peaceable, uninterrupted and continuous use of water for a period of seven years." § 2780. s 6. The territorial law further provided for forfeiture based on non-use for a period of seven years. § 2783. s 9. Case law applying § 2780 construed it

as establishing a right to obtain title by adverse use. *See e.g., Ephraim Willow Creek Irr. Co., et al. v. Olson, et al.*, 70 Utah 95, 100-101, 258 P. 216 (Utah 1927). However, "The presumption is against the acquisition of title by adverse use." *Spring Creek Irr. Co. v. Zollinger*, 58 Utah 90, 97, 187 P. 737 (Utah 1921).

c. 1897 – 1898, Adverse Use Provision Dropped

Statehood came to Utah in 1896. The 1897 legislature adopted new provisions relating to water. With respect to appropriation it provided: "The right to the use of any of the unappropriated waters of the state may be acquired by appropriation." SECTION 1, CHAPTER LII. The adverse use provision was dropped. The seven year forfeiture for non-use was retained, Sec. 2, and a criminal offense was enacted for "any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer. . . ." Sec. 25.

The territorial laws published in 1888 were superseded in their entirety by the publication of the *Revised Statutes of the State of Utah 1898.* As stated in the PREFACE, these were published pursuant to legislative authorization granted in Chapter 85 of the Laws of 1896 and had the effect of repealing all laws enacted prior to the second regular session of the legislature (1987) unless otherwise noted. The *Revised Statutes* did not include a provision for acquiring a water right by adverse use and such a provision never again appears in Utah statutory law.

d. 1903 - Appropriation by Application

The 1903 legislature adopted "CHAPTER 100, Water Rights and Irrigation," which for the last one hundred plus years has been the basic law governing the acquisition of water rights in this state. It created the office of the State Engineer and charged him with the "general supervision of the waters of the State and of their measurement, apportionment and appropriation." SECTION ONE. The act went on to provide: "Sec. 34. **Rights to Unappropriated Water.** Rights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner hereafter provided, and not otherwise." The phrase "manner hereinafter provided" was the lead-in to Section 35 which required that an application to appropriate be filed with the State Engineer before an appropriation was undertaken. The 1903 act further retained the provision for forfeiture based on seven years of non-use. Sec. 50.

e. 1919 - General Adjudication; Five-Year Forfeiture

In 1919, the legislature reenacted the basic appropriation statute of 1903, created the basic structure of a general adjudication, which essentially remains in force today, and reduced the period for forfeiture based on non-use from *seven* years to *five* years. *See* Sec. 6 Chapter 67. The change from seven years to five years did not become a focus until years later and will be discussed *infra*.

f. 1925 - Uncertainty Appears

The subject of whether adverse use survived the 1903 appropriation statute and its reenactment in 1919 appears to have first surfaced in *Deseret Livestock Co. v. Hooppianna, et al.*, 66 Utah 25, 239 P. 479 (Utah 1925). The *Deseret* case evidences

either lingering or newly advanced judicial doubt as to whether the appropriation statute of 1903 as recodified in 1919 had forever extinguished a claim based on adverse use. A majority of the court was certain that it had. "We are of the opinion, and so hold, that the legislature of Utah, by the act of 1903, intended to limit the method of acquiring any right to the unappropriated public waters of the state to the method or means prescribed in that act." 66 Utah at 38. A concurring opinion added: "The very language and purpose of the act, when construed in connection with the acts which it superseded and repealed, demonstrates conclusively that the purpose was to provide an exclusive method of appropriating water and securing a record title thereto." *Id.* at 39. The two dissenters did not agree and took some forty-four pages examining the law from all of the surrounding states. *Id.* 39-82. They sought to make the case that a water right need not be based upon application, but could become vested by "actual diversion of waters and applying them to beneficial use. . . . There is no better evidence of possessing anything than by seizing and taking it." 66 Utah at 48. The dissents prompted considerable frustration of the majority as is apparent in the concurring opinion of Justice Thurmond:

> The question is, if the legislature of the State of Utah had the power to enact an exclusive method of initiating an appropriation of water, and procuring the title thereto, what else could it have done or what more could it have said than has been done and said through all this course of legislation down to the present time? If plain, emphatic unequivocal language is not sufficient to express the intention of the legislature, in what manner and by what means can the legislature express its intention?

Id. 42-43.

Seven years after the *Deseret* decision, the court decided *Clark, et al. v. North Cottonwood Irrigation and Water Co. of Farmington*, 11 P.2d 300 (Utah 1932). In the

meantime, the composition of the court had changed. Three new justices had been appointed. Of the two who remained, one had concurred and one had dissented in *Deseret*. The court decided to sidestep the issue:

> It may be a debatable question whether title to a water right may be acquired since the enactment of Laws of Utah, 1903, Chap. 100, by adverse use or after it has been abandoned by a prior appropriator without a filing in the office of the State Engineer as provided by law. . . . [*citing Deseret*]. This case does not require a decision of that question, and we do not express any opinion concerning the same.

11 P.2d at 304-305.

g. 1935 – Strengthening the Statute

The 1935 legislature amended both the *forfeiture* provision and the provision governing appropriation. Under Section 100-1-4, an appropriator could avoid the automatic forfeiture after five years of non-use only by timely filing "with the State Engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water" or to apply for an additional extension. Failure to timely file the request resulted in the forfeiture. The *appropriation* provision was amended to read as follows:

> 100-3-1. **Only Manner of Acquiring Water Rights.**
>
> Rights to the use of the unappropriated public waters in this state may be acquired *only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise.* . . . [Emphasis added to the new language adopted.]

Prior to the amendment, the statute had read: "Rights to the use of the unappropriated public waters in this state may be acquired by appropriation in the *manner hereinafter provided and not otherwise*." (Emphasis added.) The application process was set forth in a separate section. The dissents in *Deseret* had expressed the view that the majority was placing undue emphasis on the words "and not otherwise" and that they should be viewed in the context of the whole statute rather than being tied exclusively to the process of acquiring a water right by filing an application with the State Engineer. *See, e.g.*, discussion 66 Utah at 79-82. The 1935 amendment brought the provisions together in the same section, thus making clear the legislative intent to connect the "not otherwise" language with the "application" process.

h. 1937-38, Turning the Law Upside Down

In 1937, the supreme court handed down two decisions that temporarily derailed the legislative effort to end rewarding water thievery. Rather than condemn such, the court legitimatized the dreaded practice of stealing water and raised it almost to an honored station foreign to a civilized society. Finding no support in the water code, the court turned to the law of adverse possession relating to land, citing 104-2-9 to 104-2-12, inclusive, *Revised Statutes of Utah 1933*. It held that rights to the use of public water could be obtained by "disseisin of the owner" under the statutory provisions of adverse possession. These sections simply don't fit. The court disregarded fundamental differences between land which has a fixed situs and water that is in perpetual motion. It indirectly invited a fight on the ditch bank and offered a glorified view of an adverse possessor:

> He enters as a conquistador, bent upon acquiring that which another possessed, not necessarily vi et armis, by killing or physically ejecting the owner, but by the process of assuming and exercising the rights and prerogatives of the owner, without his consent and in defiance of the owner's will. He plants his flag, his standard, as it were, upon the property as notice to the owner and all the world that he has taken possession, and henceforth will govern and control it; that the property henceforth has a new owner and that he proposes to maintain that title and possession against all.
>
> From Attila, the Hun, down through the colonial expansions of the Seventeenth and Eighteenth centuries to the present, the right of one with sufficient nerve and courage to extend his dominions by the simple process of taking possession has been recognized, subject only to growing and more definite and refined methods and requirements of manifesting the possession and the intention to take and hold.

Hammond v. Johnson, 66 P.2d 894, 900 (Utah 1937). The second decision, *Adams v. Portage Irrigation Reservoir and Power Co.*, 72 P.2d 648 (Utah 1937), issued later in the year, relied upon *Hammond* and did not alter the debate.

The full thrust of these decisions was short lived. Each prompted strong petitions for rehearing not only by the losing party but by the State Engineer who argued that the rights of the public had been wholly disregarded. While the rehearing petitions were denied; each resulted in a written opinion which was much more subdued, and limited. Moreover, the votes which had been unanimous were now three-two. The *Hammond* majority treated the prior opinion as settling only a private dispute between two users at the end of a ditch and not "effect[ing] any right which the state or any other person, not a party or claiming under a party, had or could assert in or to the waters in question." *Hammond*, rehearing denied, 75 P.2d 164, 166 (Utah 1939). *Adams* is in accord,

rehearing denied, 81 P.2d 368 (Utah 1938). The dissenters wanted to grant rehearings "in order that we may determine whether title to a water right may be obtained against anyone by adverse possession." *Hammond*, 75 P.2d at 167. As a result of the initial decisions and the partial withdrawals, the whole doctrine of adverse use of water was thrown into a state of uncertainty and disarray.

i. *Hammond* Could Not be Disregarded

Notwithstanding the back peddling by the court, *Hammond* had made two points which could not be disregarded and required legislative clarification. With respect to the *appropriation* provision, 100-3-1, and the *application* provision, 100-3-2, *Hammond* had stated:

> It is clear from the language that the sections above quoted apply only to acquiring rights in the *unappropriated* public water and have no reference to water rights which have passed to private ownership until they have been abandoned and thereby reverted to the public.

[Emphasis by the court.] Since most of the public's water had been *appropriated* by 1937, the distinction drawn by the court, when coupled with the second point discussed below, would have rendered the appropriation statute of 1903 almost meaningless.

The second substantive, but misguided, point from *Hammond* was to the effect that so long as previously *appropriated* water was being used by a private claimant, it didn't matter who it was or how he/she came by it. The appropriator in *Hammond* had openly accused the adverser of "stealing" his water. The court was oblivious to the wrong, but relied upon the stealing accusation as evidence that the appropriator had not

abandoned the water; concluding thereby that it could not have reverted to the public. 66 P.2d at 901. *Hammond's* reasoning appears in this excerpt:

> As long as water, which has passed to private hands, is put to a beneficial use, the state has no vital interest as to who the user is. That is, as long as the use granted and recognized by the state is exercised, the state has no interest in what may be the name of the person who exercises it. It follows, therefore, that notwithstanding the statute of appropriation, as between private claimants, water rights in Utah can be acquired by adverse user and possession.

66 P.2d at 900-901.[2]

j. 1939 – Permanently Closing the Door on Adverse Use

The foregoing set the stage for the 1939 legislature. Its assignment was clear. It needed to settle the uncertainty expressed by the court in *Deseret* (1925) and *Clark* (1932). It also had to definitively refute or let stand the bold assertions of the *Hammond* court as to the two points last discussed. Finally, if there were a deficiency in its prior language, that had to be cured. The '39 amendments were simple, straightforward and definitive. The *appropriation* statute was amended to read as follows:

> 100-3-1. **Appropriation – Manner of Acquiring Water Rights.**
>
> Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter

---

[2] *Hammond* appears confused about the statutory forfeiture period that controlled. The court quotes from the *Revised Statutes of 1933*, which had incorporated the 1919 change from *seven* to *five* years, but went on to state that the compiled laws of 1917 (seven years) governed even though the claimed period of use was from February 1925 to October 1934. No explanation is given for this apparent misstatement. 66 P.2d at 899, 901. It becomes a non issue here because *Hammond* went on to hold that it didn't matter who used the water (appropriator or adverser) so long as it was not allowed to run to waste.

provided, and not otherwise. . . . *No right to the use of water either* ***appropriated*** *or* ***unappropriated*** *can be acquired by adverse use or adverse possession.* [Emphasis added to the newly adopted language.]

Thus the *Hammond* court's distinction between *appropriated* and *unappropriated* water was rendered meaningless. Further, the *Hammond* court's assertion that "water rights in Utah can be acquired by adverse user and possession," 66 P.2d at 900-901, was flatly rejected. The uncertainty in *Deseret* and *Clark* were eliminated.

The *forfeiture* provision was amended to read as follows:

100-1-4. **Reversion to Public by Abandonment or Failure to Use Within 5 Years – Extending Time.**

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue *is* extended by the state engineer as hereinafter provided. *The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right.* . . . [Emphasis added to the newly adopted language.]

The assumption by the *Hammond* court that the identity of the user and the legitimacy of the use was of no interest to the state proved to be false. Use without right was a nullity. The adverser got nothing. Forfeiture was not stayed. It was as though the water ran to waste. Moreover, as a result of the 1935 amendment, not discussed by *Hammond,* the only way to avoid forfeiture at the end of five years was for the "appropriator or his successor" to apply for an extension. This provision likewise applied if the water ran to waste or was being used by an adverser.

k. Finality Achieved

The foregoing brought the statutory evolution to an end and provided finality. When Senate Bill No. 234 (*see* the '39 session laws attached as part of *Addendum 5*) passed the legislature on March 7, 1939 and became effective on March 20 of that year, any benefit associated with the taking of water belonging to somebody else was at an end. It seems apparent that the legislature thought it was dead long before, but as of that date, it clearly became a closed chapter in the history of Utah water law. The very nature of the '39 amendments precludes an argument that unlawful use thereafter could somehow mature into a vested right or could qualify to prevent statutory forfeiture.

II. With One Exception, Post-1939 Supreme Court Decisions Support the Proposition that Acquisition of a Water Right by Adverse User Ended in 1939.

There are only a handful of post-1939 cases that need to be examined. Each will be addressed.

a. *Wellsville East Field Irr. Co. v. Lindsey Land & Livestock*, 130 P.2d 634, (Utah 1943). *Wellsville* is by far the most important post-1939 decision. While its historical analysis is more abbreviated than the foregoing, it essentially follows the same path in tracing the development of Utah water law from 1888 through the statutory changes of 1939. The claimed adverse use in *Wellsville* had commenced in 1922. *Id.* at 637. Hence the assigned task of the *Wellsville* court was to deal with the uncertainty *between* 1903 and 1939. The court describes the manner in which the stage was set after denial of the petitions for rehearings in *Hammond* and *Adams*, and what was left for the court to decide following the legislative amendments:

> Both of the denials of petitions for rehearing were by 3-2 decisions. The dissenting justices felt that the whole question of adverse user in relation to water rights should have been reopened and not left in its existing state of uncertainty. Subsequently at the 1939 session, *see* Laws of Utah 1939, Ch. 111, *the legislature adopted amendments designed to prevent the acquisition of a right to water already appropriated by another, solely by adverse user. Thus the question as to whether title could be acquired by adverse user* ***during that period between 1903 and 1939*** *is still left in a state of uncertainty.*

Id. at 639 (emphasis added).

The *Wellsville* court proceeded to examine the two year disparity between the five year *forfeiture* provision and the seven year *adverse user* requirement. The court recognized that the only way to protect the adverse user's claim during the two year hiatus was to allow use by the adverser to keep the appropriation alive and prevent forfeiture to the public. The court, however, also recognized that this could not extend beyond the legislative amendments of 1939:

> Therefore if we were to hold that non-use resulting from an unlawful diversion by another would work a statutory forfeiture, we logically would be compelled to hold that title could not be acquired by adverse possession. The converse of this is also true; that is, if title can be acquired by adverse use, then title does not revert to the public after five or more years of adverse use. *This would be the result of such a holding as to a right* ***vesting prior to 1939*** *when Section 100-1-4 [forfeiture] was amended to read that "the provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right."*

Wellsville at 639 (emphasis added).

The district judge below appears to have simply overlooked the 1939 amendment to the *forfeiture* statute. He makes no reference to it nor to the concept that "use without

right" is treated the same as allowing the water to run to waste. Here is what the lower court said beginning at page 11, *Memo. Dec.*, *Addendum 4*, TR 914-15.

> It is clear from the *Wellsville* case that an adverse possessor acquires some type of right as against everyone else (except the true owner) even if an adverse possessor is still in the process of satisfying the statutory period. This pronouncement was made in the context of discussing the interplay between the five-year forfeiture statute and the seven-year adverse possession statute. The *Wellsville* court said the following:
>
> > However, we held that as between the prior owner and the adverser, the adverser could after seven years of open, notorious etc., possession, have his title quieted as against the prior owner. Hence, we must have held that the adverser got *something.* If after five years of nonuse title reverted to the public, neither the adverser nor the prior owner would have any title. At 638-9. (Emphasis added by the lower court.)

Neither the logic nor the conclusion of the lower court seem consistent with the language quoted and its context. *Wellsville* was not talking about the case before it nor about the state of the law after the 1939 amendments. It is a commentary on the dilemma created by the *Hammond* decision. The gist of the *Wellsville* predicament growing out of *Hammond* is that the court had been "painted into a corner." *Wellsville* could not disregard the fact that in *Hammond,* the adverser's title had been quieted against the prior owner. Hence "the adverser got something," even though on rehearing the court "purported to leave open the question as to whether or not title had reverted to the public." At 638. The *Hammond* court's effort to narrow the holding from the first opinion created a *non sequitor*. *Hammond* could not quiet title in the adverser and leave the issue of adverse use open at the same time. Unable to reconcile the inconsistency, *Wellsville* put on its pragmatic hat. It noted the uncertainty and potential detrimental

reliance introduced by the court, and reached a practical result with *fixed time parameters*.

> The case of *Hammond v. Johnson, supra,* held that the forfeiture statutes *prior to 1939* did not apply to a case where the failure to use was the result of an *unlawful diversion by another*, and that title can, therefore, be acquired by adverse user. We think that this attains a *desirable result and conclude that title could* ***between 1903 and 1939*** *be acquired by adverse possession.* (Emphasis added).

There is an absence of any discussion in *Wellsville* that supports application of *Hammond* beyond 1939, or any basis for arguing that the adverser could have been treated the same after the '39 amendments. The cutoff is clearly fixed as of 1939 because after that use by the adverser is the same as though the "water is permitted to run to waste." 100-1-4.

b. *Smith v. Sanders*, 189 P.2d 201 (Utah 1948).

In *Smith*, the defendant Sanders had failed to establish a valid appropriation or seven years of adverse use. In commenting on the failure of proof, the court revealed its view of the impact of the 1939 legislation:

> Unless there had been a valid appropriation of the water no one could obtain any rights to it by adverse user even under our decisions in *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894, and *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, which held the right to the use of appropriated water could be obtained by adverse possession ***before*** *our legislature in Session Laws of Utah 1939*, Ch. 111, *amended* Sec. 100-3-1, R.S.U. 1933, *and prohibited the acquiring of the right to the use of either appropriated or unappropriated waters by adverse possession.*

[Emphasis added.]

c. *Mitchell v. Spanish Fork West Field Irrigation Co.*, 265 P.2d 1016 (Utah 1954). *Mitchell* is an innocent decision that has subsequently been cited for something for which it does not stand. The whole of relevant language from *Mitchell* is as follows:

> Plaintiff's claim to the waters in question is based on adverse user from 1899 to 1939; since which date the *initiation* of water rights by this method has been precluded by statute.

Id. at 1019 (emphasis added). The language in context is relatively benign. It does not purport to address use which overlapped the statutory changes of 1939. The language is correct in its application to the facts before the court which concerned use that predated 1939. However, by use of the word "initiation" the court appears to have inadvertently invited an argument advanced years later and embraced by the district court below. The *Mitchell dicta* is extremely weak for all that has been attributed to it.

d. *In re Drainage Area of Bear River in Rich County*, 361 P.2d 406 (Utah 1961). One of the water claimants governed by the 1919 general adjudication of the Bear River subsequently claimed a greater quantity by adverse use which continued after the decree. The court identified the outer limits of an advance use claim after the '39 amendments.

> Proof of water by adverse use is difficult. Our territorial statutes recognize such a right as did our judicial decisions after statehood until made ineffective thereafter by the 1939 legislature. *So appellants could acquire water rights by adverse use only by continuous adverse use for seven years after the 1919 decree and* ***before*** *the 1939 statute.*

361 P.2d at 410 (emphasis added). Because there were twenty years between the Bear River decree and the statutory changes, the court did not need to directly confront the issue of adverse use which overlapped 1939, but its language is clear, direct and on point. It led the authors of *Brigham Young University Legal Studies, J. Rueben Clark Law*

School, to conclude that "any possible claims of a right arising by adverse use *must have matured before the 1939 amendment* to the code." *Summary of Utah Real Property Law*, 1978, Volume II, Chapter XIV, Water Law, § 14:32, page 628 (emphasis added) (*See Addendum 6*).

e. *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 Utah 3, 5 P.3d, 1206.

We come at last to the *Silver Fork Pipeline* case which contains contrary *dicta* on which Defendant relies. The adverse use claim in *Silver Fork Pipeline* commenced during the early 1940's after a ditch was authorized and excavated across Forest Service land. There was no use which preceded the 1939 statutory changes. *Id.* at 1220-22. The adverse use claim was rejected for this reason. In this context, the court included footnote number 19 which reads:

> Before 1939, Utah law allowed a party to obtain title to use of water by adverse possession. *See Hammond v. Johnson*, 94 Utah 20, 28, 66 P.2d 894, 900-01 (1937). Following an amendment to Utah's Water Code in 1939, adverse use that began before 1939 could still ripen into title after the effective date of the Act. *See Mitchell v. Spanish Fork West Field Irr. Co.*, 1 Utah 2d 313, 317, 265 P.2d 1036, 1019 (1954); *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 460-66, 137 P.2d 634, 640 (1943). However, adverse use commenced after the effective date of the act could not ripen into title by adverse possession: "[N]o right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession." 1939 Utah Laws ch. 111, § 1.

The district court below acknowledged that the language from *Silver Fork Pipeline* was *dicta,* but expressed the view that it may be helpful in predicting how the supreme court would rule on the issue at hand. *Memo. Dec., Addendum 4* at 12, TR 915. Such would likely be true if the court's footnote evidenced both a careful analysis and a solid legal foundation. It evidences neither. The facts of *Silver Fork Pipeline* did not call

for a careful analysis of the "overlap" issue since the claimed use began during the early 1940's well after the '39 statutory changes were in force. The legal foundation is limited to *Mitchell* and *Wellsville*. These cases have been extensively discussed above. Each supports the *result* reached in *Silver Fork Pipeline* (no adverse use after 1939), but neither supports the position that the effective date of the '39 amendments could be delayed to protect an adverser whose water right was not vested. *Wellsville* is quite clearly to the contrary, as is the *Bear River* decision.

Plaintiffs respectfully submit that the benign use of the word "initiation" in *Mitchell* is a woefully inadequate foundation for disregarding what appears to be a four-decade effort by the legislature, culminating in 1939, to put an end to rewarding those who steal water. Moreover, and more importantly, the clear language of the statute will not allow credit for "use without right" after March 20, 1939. Plaintiffs are unaware of any basis by which this court could decline to apply the statutory changes adopted. The language from *Silver Fork Pipeline* should be treated for what it was – a footnote that went beyond what the facts of the case required. There should be no reluctance to decline to rely on *dicta* when it contradicts what the legislature has so clearly provided.[3]

---

[3] Troubled by the footnote from *Silver Fork Pipeline* and the absence of support in *Mitchell* or *Wellsville* on which it is bottomed, I have earnestly attempted to find some explanation for what appears to be an erroneous statement of the law. In this effort I have examined articles by well-known experts on Utah or western states water law. They include works by Wells A. Hutchings, Richard L. Dewsnup, Dallin W. Jensen and Robert W. Swenson. Excerpts from these publications are attached hereto as *Addendum 6*. With one exception, there is no support in any of these for the *Silver Fork Pipeline* language. The exception is a "passing" comment in *A Primer of Utah Water Law* by Robert W. Swenson, former professor of law at the University of Utah. It may have spawned the *Silver Fork Pipeline* footnote and the reliance on the *Mitchell* case as authority. The

III. The Plain Meaning of the Statutes and Their History Preclude the Adverse Use Claim Advanced by Defendant

a. The Plain Language and History of the Statute are Consistent.

"This court's primary objective in construing enactments is to give effect to the legislature's intent." *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996); *Smith v. Price Development Co.*, 2005 UT 87 ¶ 16. "The legislature's intent is manifested by the language it employed." *Id. citing Green River Canal Co. v. Olds*, 2004 UT 106 ¶ 18. Normally a court would not look to legislative history unless the statutory provisions are ambiguous. *See id. citing Wilcox v. CSX Corp.*, 2003 UT 21, ¶ 8. In this case, Plaintiffs have laid out the legislative history because they perceive a greater challenge arising from the contrary *dicta* in *Silver Fork Pipeline*. That *dicta* should be given no deference, first for the reason that unlike the instant case the *Silver Fork Pipeline* facts do not overlap the 1939 statutory changes, and second on the basis that its *dicta* runs counter to

---

supreme court would have been aware of the Swenson article because it was quoted on another topic in *Provo River Water User's Ass'n v. Morgan*, 857 P.2d 927 (Utah 1993), which decision was quoted and discussed at some length in *Silver Fork Pipeline*. The reader is invited to closely examine the abbreviated treatment given by Professor Swenson to the adverse user subject. In an article well in excess of 100 pages, he devotes less than a page and one-half to this topic. Moreover, the commentary is not complimentary of the supreme court's handling of adverse user cases. Swenson finds little to appreciate in the deference paid Attila the Hun, *Swenson* at 189, and notes the anomaly of acquisition of a water right before 1939 based on seven-years adverse use when it took twenty years to obtain a prescriptive easement for an irrigation ditch, *id.* at 191. In passing, and without analysis, he makes a one sentence comment about the 1939 amendment and states that the supreme court "later indicated that adverse use which had commenced prior to 1939 could ripen into title after the effective date of the act." *Id.* at 190. The sole and only authority cited in support of this attribution to the supreme court is the *Mitchell* case. Hence, it appears that the whole of the foundation for the out-of-harmony *dicta* from *Silver Fork Pipeline* may be one word – "initiation" – perhaps improvidently and likely innocently used in the *Mitchell* decision.

a clear and extensive legislative history that conclusively demonstrates that the legislature intended exactly what it stated in the '39 amendments.

b. There is no Basis to Decline Enforcement of the 1939 Statutory Amendments.

It is universally understood that the legislature has the power to adopt measures thought to be in the best interests of the people unless those measures are violative of constitutional principles. Both the Utah and United States Constitutions contain a prohibition against the taking of *private property* without just compensation. *Utah Constitution*, Article 1, Section 22. *United States Constitution*, Fifth Amendment, made applicable to the states under the fourteenth amendment. *Smith v. Price Development,* ¶ 11, *citing Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 122 (1978).

The lower court engaged in a discussion about whether the '39 amendments were retroactive because they precluded Defendant from completing the seven years necessary to vest title by adverse use. *Memo. Dec.* at 9, TR 912. The implication is that there has been a "taking" - that the legislature took away an entitlement belonging to Defendant. To the contrary, the legislature simply drew a line after which the unauthorized use of water belonging to someone else produced no benefit for the adverser. This is a clear justified public policy decision, only "actionable" if Defendant were deprived of "a protectable property interest." *Smith*, ¶ 12, *citing Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). To be protectable, the interest must be "vested." *Id.* ¶ 14, relying on the seminal case of *McCullough v. Virginia*, 172 U.S. 102, 1234 (1898). Like the claimant in *McCullough,* Smiths had obtained a judgment in the trial court. "The first

step in our analysis is therefore to determine whether the Smiths had a *vested* interest in the disputed portion of the . . . judgment." *Smith* ¶ 15. (Emphasis by the court.)

In determining whether the property interest had *vested*, the *Smith* court turned to the case of *Banks v. Means*, 2002 UT 65 ¶ 12 n. 3 for a definition. *Banks* adopted a definition from *Black's Law Dictionary*, 1557 (7th ed. 1999): "A 'vested' interest is something '[t]hat has become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute . . . .'"

The supreme court engaged in a similar inquiry in *Utah Public Employees Association v. State*, 2006 UT 9. In that case public employees claimed that HB 213 adopted by the 2005 legislature resulted in an unconstitutional taking of "*vested* personal property to which they have a contractual right." *Id.* ¶ 27. The court disagreed concluding: "Plaintiff's lack *vested* contract rights." *Id.* [Emphasis added.] "Both parties agree that a public employee obtains vested rights to retirement benefits 'only when he has satisfied all conditions precedent.'" (Citation to footnote omitted). "We agree that parties must satisfy all conditions precedent before the rights vest." *Id.* ¶ 29.

The court below declined to apply the *Utah Public Employees Association* case because it involved contract rights and the case before this case does not. Plaintiffs respectfully submit that the question does not center upon whether the claimed property interest is of a particular type. Generally speaking, both the U.S. and Utah Constitutions protect all types of private property, tangible or intangible. *Bagford v. Ephraim*, 904 P.2d at 1098, headnote 3-5. The relevant inquiry is not the type of property, but whether the claimant has a "vested protectable property interest." In the absence of such, the

legislature is free to act. "[A] mere unilateral expectation of continued rights or benefits" is not enough. *See id.* at 1099, citations omitted.

c. Defendant's Claim Fails Because Under the Clear Language of the Statute it Lacked a Vested Protectable Property Interest.

The amendment to the *appropriation* provision (100-3-1) effective March 20, 1939 provided: "*No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.*" At that time, Defendant was 56 months short of having a vested water right. If Defendant somehow escaped this clear prohibition, the next insurmountable hurdle was the forfeiture provision which returned the water to the public after November 30, 1941, that being five years from the alleged shift of use from Plaintiffs to Defendant. Bridging the gap between the forfeiture and the additional two years required to vest a water right by adverse use would have been impossible since no request for an extension had been filed "by the appropriator or his successor," as required by the statute. § 100-1-4.

This requirement had been in force since the adoption of the *Session Laws of 1935*. From the inception of the claimed adverse use, all parties were on notice of the deadline and that in the absence of an extension request the forfeiture could not be stayed. The date passed without an extension request being filed. Under Defendant's version of the facts, forfeiture to the public would have been inevitable. Moreover, Defendant would have been powerless to alter the outcome because as of the forfeiture date, the 1939 Amendments had been in force for over two and one-half years and Defendant's continuing "use without right" counted for no more than if the water were

"permitted to run to waste."[4] Section 100-1-4, *Laws of 1939*. (*See* the relevant text at page 9 *supra* and the full text in *Addendum 5* under *1939 Session Laws*.)

Plaintiffs respectfully submit that the *dicta* from *Silver Fork Pipeline* can not survive a direct confrontation with the clear language adopted by the 1939 legislature.

IV. Even if Legally Possible, the Equities Do Not Favor Refusal to Enforce the 1939 Legislative Acts.

The decision of the district court elevates the process of acquiring a water right by adverse user to an undeserved status. The court states that between 1936 and 1939, "the Defendant was in the process of acquiring a water right by adverse possession [use]." *Memo. Dec.* at 9, TR 912. The court then reasons, "If the [1939] statute prohibited the Defendant from completing the acquisition it would be tantamount to imposing an additional burden on the Defendant and would be retroactive in that sense." *Id.* It is as though the Defendant were an applicant carefully following the statutory appropriation procedure and was wronged when this legitimate process was cut short.

In truth, there was nothing legitimate about what Defendant was doing. Defendant was acting in direct violation of the Cox Decree and the applicable statute which provided that the consequence of failing to participate in the general adjudication was that the claimant was "forever barred from asserting its claim." Moreover the claimed

---

[4] Plaintiffs are careful to point out that they accept Defendant's version only for purposes of this appeal. It is their view that forfeiture would not have arisen because the waters in question continued to flow into the East Fork of the Sevier River and any flow into the Colorado River Drainage would have been *de minimis* prior to the earthwork in the late eighties, discovered and brought to the attention of the State Engineer in 1991, and the much more extensive earthwork clandestinely done in 1999.

conduct would constitute a criminal offense under Section 25, Chapter LII, adopted by the 1897 legislature one year after statehood. Similarly it would violate § 62, *Session Laws of 1919*, which had empowered the State Engineer to appoint water commissioners and to carry out the judgments of the courts in relation to the division, distribution or use of water and with power to arrest anyone found in violation and turn such person over to the sheriff, § 67. *Id.* Finally, under Section 103-59-1, *Revised Statutes of 1933*, it was a criminal offense to interfere with the flow of water in any stream under the management of any water commissioner.[5]

In short, after the '39 amendments, the conduct which Defendant claims it engaged in would not have been acceptable. By then it was patently clear that any benefit from stealing water was at an end and that the antics of Attila the Hun were not permitted under Utah water law, the language in *Hammond* to the contrary notwithstanding.[6] A more tempered and enlightened view was expressed by District Judge Hoyt who sat with the supreme court in the *Wellsville* case. Concurring in part and

---

[5] Plaintiffs do not accuse Defendant of these offenses because they are not persuaded that Defendant actually engaged in any diversion or use of the water from December 1, 1936 through November 30, 1943. For purposes of this appeal, they do not challenge Defendant's claim, but if true then such constitutes an admission that the various statutes were immediately violated after entry of the general adjudication decree.

[6] Attila the Hun was not a good choice for a "role model." Between A.D. 434 and his death in 453, Attila ravaged, murdered and plundered throughout much of the Eastern and Western Empires of the time. Known as the "scourge of God" for his savagery, he said of himself: "Where I have passed, the grass will not grow again." *Tyrants, History's 100 Most Evil Despots and Dictators*, Nigel Cawthorne, 2005 by Arcturus Publishing Limited, 2006 edition by Barnes & Noble Publishing Inc., page 30. *See Addendum 7.*

dissenting in part, he recognized the practical realities behind the appropriation statute adopted in 1903 and the grave danger from continuing to reward those who steal water.

> If we recognize the right of an adverser to acquire title by larceny or wrongful taking of water for a period of seven years, we have given judicial sanction to a practice which has resulted in innumerable controversies, much costly litigation and some deaths.

Wellsville, 137 P.2d at 655. It may be revealing that *Wellsville* was handed down on May 14, 1943. Some of the deaths stemming from stealing water may have been fresh in the minds of the justices.[7]

CONCLUSION

This court should hold that after March 20, 1939, when the statutory amendments became effective, adverse use of water belonging to another produced no right or benefit for the adverser. Such use could not count toward the seven years necessary to "vest" an

---

[7] At least two deaths during this time frame resulted from fights over the waters of Sevier River tributaries in the Counties of Piute and Sevier. On the morning of June 21, 1941, near the mouth of Dry Canyon on the east side of the Sevier River some eight miles south of Marysvale in Piute County, 19 year old Chad Howes was shot and killed by Walter Nielsen after a fight broke out over Nielsen's water. Nielsen was tried and acquitted in a celebrated case in which a young Calvin Rampton (later Governor Rampton), acting as a deputy attorney general, prosecuted the action for the state. *A History of Piute County*, Linda King Newell, Utah State Historical Society 1999. *See Addendum 8.* The second death stemmed from a fight over water which occurred near Koosharem Reservoir in Sevier County on August 11, 1941. *See Grass Valley History, Addendum 8.* Charles Erwin Burr had overpowered W.A. "Boss" Lipsey and according to the Information filed in the Sixth District Court, Burr "maliciously, with his bare hands, dug and put out the left eye of one W.A. Lipsey." Burr was tried to a jury and acquitted on a charge of mayhem on June 6, 1942. Criminal Number 3636, Sixth District Court for Sevier County. *See Court Records, Addendum 8.* Apparently the acquittal was too much for Lispey who had lost the eye. On the 23rd day of March, 1943, he ambushed, shot and killed Burr as the latter came riding by on his horse. *See Grass Valley History, Addendum 8.* Lipsey was convicted and sent to prison. Criminal Number 3746, Sixth District Court for Sevier County. *See Court Records, Addendum 8.*

adverse use right, nor could it prevent forfeiture of the water right to the public. Simply stated, adverse use, after the '39 amendments was treated the same as if the water were permitted to run to waste.

This holding should be based upon the dual foundation of (1) the plain meaning of the 1939 amendment of § 100-1-4 and § 100-3-1 of the water code then in force, and (2) the history of the evolution of the water code and the relationships between it and the decisions of the supreme court between the 1888 Laws of the Territory of Utah and the 1939 statutory amendments. This dual foundation is warranted in demonstrating that the contrary *dicta* in *Silver Fork Pipeline* is not the product of, nor can it withstand a full and complete analysis in light of the history which led to the 1939 statutory amendments and the plain language which the legislature adopted in ending any reward or benefit in favor of someone using water belonging to someone else.

The court should enter an order reversing the district court's refusal to enter summary judgment dismissing Defendant's adverse use claim, and direct the court to enter judgment,

1. Decreeing that Defendant has no interest in the waters in question and that they remain subject to the general adjudication decree of the Sevier River entered on November 30, 1936,

2. Enjoining and restraining Defendant from any further diversion or use of the waters in question,

3. Ordering Defendant to submit an engineering plan for reversal of the excavation and earthwork and for restoring the natural geography and revegetating the surface,

4. Reserving jurisdiction until the plan for restoration and revegetation has been fully carried out to the satisfaction of the state engineer and the court, and

5. Awarding Plaintiffs damages sustained by them, together with costs.

RESPECTFULLY SUBMITTED this 19th day of April, 2007.

THE McIFF FIRM, P.C.

By: _____
K. L. McIff
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2007, a true and correct copy of the foregoing **APPELLANT'S BRIEF ON APPEAL** was served by United States mail, first class postage prepaid on the following:

Steven E. Clyde
Edwin C. Barnes
James P. Alder
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street, 13th Floor
Salt Lake City, UT 84111-2216

_____

ADDENDA TO APPELLANTS' BRIEF ON APPEAL

TABLE OF CONTENTS

[Addendums 1-4 bound with Appellants' Brief]

[Addendums 5 – 8 bound in separate volume]

A Primer of Utah Water Law: Part I
Robert W. Swenson

Water Rights Laws in the Nineteen Western States, Vol. II & Vol. III
Wells A. Hutchins, JD

Addendum 7. *Tyrants, History's 100 Most Evil Despots and Dictators*, Nigel Cawthorne, 2005 by Arcturus Publishing Limited, 2006 edition by Barnes & Noble Publishing Inc.

Addendum 8. *A History of Piute County*, Linda King Newell, Utah State Historical Society 1999
Grass Valley History, Grass Valley History Committee
State of Utah v. Charles E. Burr (Court Record)
State of Utah v. W.A. Lipsey (Court Record)

ADDENDUM 1

State Engineer Cease, Desist and Restoration Directive

DEPA...MENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Norman H Bangerter
Governor
Dee C Hansen
Executive Director
Robert L. Morgan
State Engineer

Southern Area
130 North Main Street
P O Box 563
Richfield, Utah 84701 0563
801-896 4429

November 22, 1991

New Escalante Irrigation Company
c/o Clayne Coleman
Escalante, Utah 84726

Dear Mr. Coleman:

It has been brought to the attention of the State Engineer of a spring diversion originating in Section 1, T33S, R1W, SLB&M. This diversion consists of an earthen canal that intercepts Iron Spring and other water sources that are tributary to the South Fork of the Sevier River. The canal conveys this water approximately two miles to a point where it becomes tributary to North Creek. Upon investigation, by the State Engineers office, it has been determined that there is not a water right of record for this diversion. Therefore, the diversion and use of this water is in violation of Section 73-3-1 Utah Code Annotated, which states that no appropriation of water may be made and no rights to the use thereof initiated shall be recognized except application for such appropriation first be made to the State Engineer.

I am requesting that as soon as possible, which may not be until the summer of 1992, the canal be backfilled and revegetated to discontinue the conveyance of water.

Should you wish to meet with me concerning this matter to discuss these items, I would be happy to do so.

Your earliest response would be appreciated.

Sincerely,

Kirk Forbush

Kirk Forbush, P.E.
Regional Engineer

RECEIVED
NOV 27 1991

KF/clw

cc: Lee Sim, Directing Distribution Engineer
Gerald Stoker, Regional Engineer

ADDENDUM 2

Photograph looking east along excavated channel with dike in background.

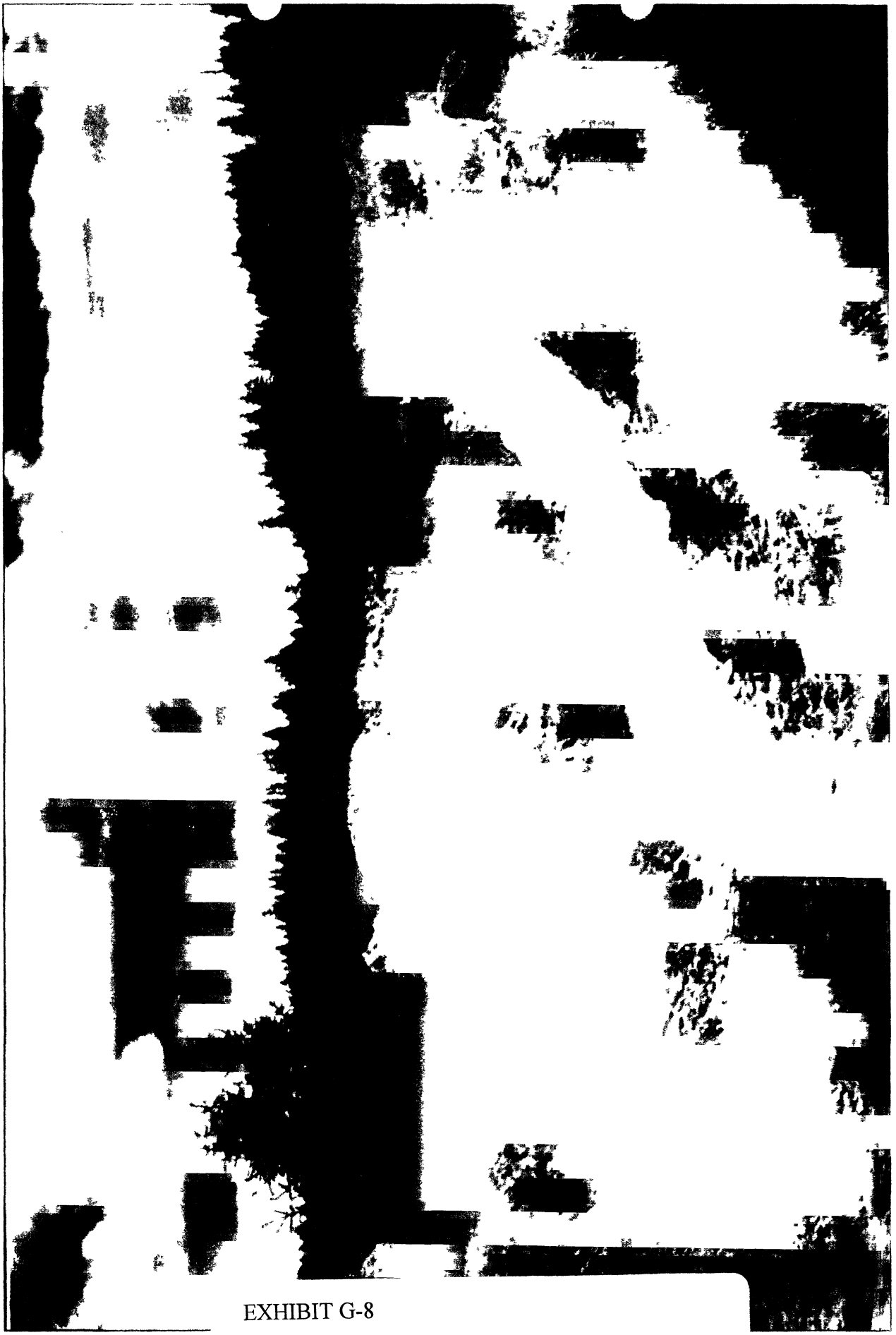

EXHIBIT G-8

Looking East along ditch at road crossing (bank

ADDENDUM 3

Photograph showing earth dike resulting from excavation with man pictured in foreground.

EXHIBIT G-13

Illustrative of height of dam after fall 1999 expansion. [Ivan Cowley pictured.]

ADDENDUM 4

Memorandum Decision

District Court

DISTRICT COURT, PIUTE COUNTY, UTAH
PIUTE COUNTY COURTHOUSE
JUNCTION, UT 84740
Telephone: (435) 577-2840 Fax: (435) 577-2433

OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation,

Plaintiffs,

vs.

NEW ESCALANTE IRRIGATION COMPANY, a Utah corporation,

Defendant.

MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Case No. 01060014

Assigned Judge: DAVID L. MOWER

INTRODUCTION

This case is before the Court on cross-motions for summary judgment. Oral argument was held on June 20, 2006. This matter is now ready for a decision.

DECISION

Plaintiff's Renewed Motion for Summary Judgment should be partially granted and partially denied. Defendant's Cross Motion for Summary Judgment should be partially granted and partially denied.

ANALYSIS

This is a dispute about water rights in a water source called Iron Spring which is located high in the Escalante Mountains at about 10,000-feet elevation west of Escalante, Utah in Garfield County. It is shown on USGS maps as being in Section 1, Township 33 South, Range 1 West, Salt Lake Base and Meridian.

The following issues are raised by the cross-motions for summary judgment: (1) whether the water source at issue was part of the general adjudication of the Sevier River System in the case of *Richlands Irrigation Company v. West View Irrigation Company*; (2) the sufficiency and effect of the notice in that case; (3) whether the Defendant could acquire water rights by adverse possession; and (4) whether the Defendant has satisfied all the elements of an adverse possession claim. The Court considers each issue in turn.

1. Was the water source included?

Defendant argues that the Iron Spring source was not included in the *Richlands* adjudication because the source was not mapped by the State Engineer. More specifically, the parties refer to the State of Utah Engineering Department 1924 Index Map of the Upper Sevier

River System. This map was prepared by the State Engineer for use in the *Richlands* case in conjunction with his proposed determination of the relative water rights in the Sevier River System. (Affidavit of Kirk Forbush in Re Mapping of the Sevier River System, ¶6.) Iron Spring is not shown by name on this map.

This map shows the Public-Land-Survey Townships and Ranges included in the System. Each Township and Range is shown subdivided into its 36 sections. If a section is numbered, the number refers to a corresponding map showing that section in greater detail. The only sections that were specifically mapped in greater detail were those where water was to be used. Sections where water arose were not mapped in detail[1].

The Sevier River has many tributaries. The larger ones are named. These larger tributaries have their own, smaller tributaries which include springs and seeps. Usually, these are not named.

The parties have stipulated that Iron Spring is a tributary to Coyote Creek, which is a tributary to the East Fork of the Sevier River. Coyote Creek is shown on the 1924 Index Map. It is in Townships 31 and 32 South, Ranges 2 West, 1 West, and 1 East, Salt Lake Base and Meridian.

---

[1] This is based on the explanation in Forbush Affidavit, ¶5. It reads: "[t]he mapping by the State Engineer focused on the lands where the water was to be used rather than the areas in which the water originates. As such, the mapping covered but a small fraction of the hydrological area of the Sevier River basin."

Iron Spring is not shown on the map. Nevertheless, it was included in the *Richlands* litigation. I will explain why I reach this conclusion.

The *Richlands* litigation was presided over by Judge LeRoy H. Cox. He issued a final decree. It is widely used and cited as the Cox Decree. It contains this language: "This cause has been brought . . . for the purpose of having determined the relative rights of the various claimants to the waters of Sevier River and its tributaries, including springs and wells, all of which are hereinafter referred to as the Sevier River System." (Decree Adjudicating the Sevier River System, Honorable LeRoy H. Cox, Case No. 843, ¶1.)

From this language I conclude that the System was defined by hydrology, meaning the combination of geography and the law of gravity. Judge Cox was determined to define the relative rights to all the water flowing into the Sevier River Drainage under the forces of geography and gravity.

The water from Iron Spring would naturally flow into the Sevier River Drainage. Hence, it was included in the Cox Decree.

2. Sufficiency of Notice

Generally, a party is bound by the outcome of a general adjudication only if the notice given was reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Provo River Water Users Association v. Morgan*, 857 P.2d 927, 934 (Utah 1993).

The *Richlands* case was filed in Millard County on April 28, 1919. In time it became a general adjudication to determine and settle all the rights in the Sevier River System. The State Engineer followed the notice procedure outlined in Section 22, Chapter 67 of the Laws of Utah, 1919. Notices of the litigation were published in the *Manti Messenger* on October 8, 1920 and in the *Richfield Reaper* on October 9, 1920. Those responding were then personally served by the State Engineer.

Unknown claimants were served by publication, as permitted by the court order issued on September 22, 1925. The order directed the State Engineer to publish notice of summons in the *Deseret News*. The court had determined that the *Deseret News* was the paper of "general circulation in Kane, Garfield, Piute, Sevier, Sanpete, Juab, and Millard counties and was most likely to give notice . . . ." (Order, September 22, 1925.) The summons was published in the *Deseret News* for five consecutive Saturdays from October 3, 1925 till October 31, 1925.

This evidence is sufficient to show that proper notice was given to the Defendant.

The Defendant counters this evidence with the Affidavit of Melvin Alvey. This Affidavit contains the following statement: "We never received notice of the adjudication conducted for the Sevier river and its tributaries, and were not provided an opportunity to make a claim to this water in that proceeding, as well." ¶9.

It is immaterial whether Mr. Alvey or anyone actually read the notice in the *Deseret News*. All that is required to satisfy the notice requirement is that the notice be "reasonably

calculated" to reach all potential claimants. In this case, the State Engineer published such a notice in the newspaper of general circulation in the counties where potential claimants resided. The Affidavit of Melvin Alvey does not raise any issues of material fact and does not preclude the finding that the notice was properly given to the Defendant.

My conclusion is that the Defendant had sufficient notice of the *Richlands* litigation.

The parties have stipulated that no statement of claim was filed by Defendant in the *Richlands* case.

The statute in effect at the time read as follows: ". . . any person, corporation or association failing to make and deliver such statement of claim . . . shall be forever barred and estopped from subsequently asserting any rights and shall be held to have forfeited all rights to the use of said water . . . ." Laws of the State of Utah, Chapter 67, Section 29 (1919)[2].

This Court takes judicial notice of the contents of the decree issued by Judge Cox in the *Richlands* case on November 30, 1936. ("the Cox Decree.") It contains no mention of the Defendant nor of its predecessor.

The Cox Decree adjudicated "the relative rights of various claimants to the waters of Sevier River and its tributaries, including springs and wells." Defendant made no claim and received no rights in the Iron Spring water source. It forfeited all rights to the use of water

---

[2] This statute is still in effect today. The entire legislative history is: History: L. 1919, ch. 67, § 29; R.S. 1933 & C. 1943, 100-4-9.

arising therefrom. Its rights were properly determined.

3. Adverse Possession

Defendant has advanced an alternative basis for relief in its favor. The basis is adverse possession. Specifically, Defendant claims that it began adversely possessing water on December 1, 1936 and has done so continuously since then.

One of the elements of adverse possession is uninterrupted use for seven years, which in this case would be from 1936 until 1943. The problem here is that a significant event occurred in the midst of that seven-year period. The event was a statute change effected by the legislature in 1939.

The statute was Section 100-3-1, Revised Statutes of Utah, 1933. In 1939 the Legislature added these words to the statute:

> No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession[3].

---

[3] The complete text of the pre-amendment and post-amendment statues is as follows:
On December 1, 1936 the statute read as follows:

> Rights to the use of the unappropriated public waters in this state may be acquired by appropriation in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8." Revised Statutes of Utah, Section 100-3-1 (1933).

After the statute was amended in 1939 it read as follows:

> Rights to the use of the unappropriated public waters in this state may be

The result of the statute change was significant for this case. After 1939 water rights could not be obtained by adverse possession.

The Defendant's theory is that its adverse possession claim began in 1936 and was in the process of ripening as time passed thereafter. Hence, in 1939 the Defendant had some type of right, even though it was not a fully ripened adverse possession right. Thus, this Court has to decide whether the Defendant's right could still ripen after 1939 regardless of the change in the law or whether the 1939 amendment completely extinguished the Defendant's ripening right.

This is a novel question. I have sought guidance from prior decisions of our appellate courts.

In *Wellsville East Field Irrigation Company v. Lindsay Land & Livestock*, the Supreme Court held that the 1939 amendment was not retroactive. 137 P.2d 634, 656 (Utah 1943).

The term "retroactive" is not defined in the case. I have found a definition in a law dictionary. "Retroactive" means "not intended to impose any new burden, duty, obligation, or

---

acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation mut be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession. Laws of the State of Utah, Section 100-3-1 (1939). (The underlined words are those added by the 1939 amendment.)

liability concerning past events." See The Law Dictionary (2002) (Anderson Publishing Co.)

The past event here was the time period from 1936 to 1939, during which the Defendant was in the process of acquiring a water right by adverse possession. If the statute prohibited the Defendant from completing the acquisition it would be tantamount to imposing an additional burden on the Defendant and would be retroactive in that sense.

Here, our Supreme Court has determined that the 1939 amendment was not retroactive. Hence, Defendant's ripening right should not be burdened and should not be extinguished.

Plaintiffs counter with the following argument. It is agreed that the 1939 amendment has only prospective application and is not retroactive. However, there is a difference between a vested right and a ripening right. A prospective statute has no effect on vested rights; they are protected.

Defendant's rights were not vested in 1939. They could not possibly become vested until 1943. By then the amendment would have been in effect for 4 years and any claim based on adverse possession would be prohibited. Since Defendant's rights were not vested in 1939, they were extinguished by the amendment.

Plaintiff's argument is that this is the correct result because it is analogous to the result in *Utah Public Employees Association v. State*, 131 P.3d 208 (Utah 2006). In that case, the employee benefits statute was amended in 2005 to allow only 75% of a state employee's banked (in other words, accumulated/unused) sick leave accrued prior to January 1, 2006 to be used

toward medical and life insurance upon retirement. Id. at 211. The remaining 25% was to be contributed to the employee's 401(k) plan. Id. Prior to this amendment, retiring state employees could use 100% of their banked sick leave toward medical and life insurance coverage. Id.

The amendment became effective on January 1, 2006. Every state employee who did not retire before that date became subject to this new provision. As a result, most government employees suffered a reduction in anticipated post-retirement medical- and life-insurance benefits. Several plaintiffs challenged the constitutionality of the amendment upon the theory that it took away their vested rights.

The Supreme Court held that the rights of the state employees were not vested and would not become vested until retirement and that the statute did not work an illegal taking.

The logic of the *Utah Public Employees* holding is closely analogous to the facts in the case at bar. The following logical chain will illustrate this analogy:

a. Rights do not vest until all conditions precedent are met.
b. One of the conditions precedent is seven (7) years of possession or use.
c. New Escalante did not meet this condition.
d. Therefore, its rights did not vest.
e. Conclusion:
    i. Non-vested rights have no value and can be modified at will by legislative enactment.
    ii. There was such a legislative enactment.
    iii. New Escalante's rights were deleted by the legislative enactment.

The problem with this logical chain lies in the connection between steps d and e. I will describe the problem that I see.

In *Utah Public Employees*, the Supreme Court was faced with ambiguous statutes. P30 through P36; also at 216-8. It chose to resolve the ambiguity by engaging in an analysis based on contract-law-related principles. Id. P39; also at 219. That particular analytical method served the Supreme Court well in the circumstances of that case. The circumstances were an employer-employee dispute. The Supreme Court found contract-law principles to be useful in resolving that type of dispute. The Supreme Court was able to reach a decision and dispose of the appeal.

However, I see a problem in extending the contract-law-based principles to the facts of this case. The facts here do not lend themselves to the type of offer-and-acceptance analysis utilized by the *Utah Public Employees* court. This case is not about employer-employee relations. It is a case based on statutory law and common law.

I conclude that the reasoning of the *Utah Public Employees* decision is not helpful in resolving the legal issues raised by the Defendant's Motion for Summary Judgment. I must consider other appellate opinions for guidance.

It is clear from the *Wellsville* case that an adverse possessor acquires some type of right as against everyone else (except the true owner) even if an adverse possessor is still in the process of satisfying the statutory period. This pronouncement was made in the context of discussing the interplay between the five-year forfeiture statute and the seven-year adverse possession statute. The *Wellsville* court said the following:

> However, we held that as between the prior owner and the

> adverser, the adverser could after seven years of open, notorious etc., possession, have his title quieted as against the prior owner. Hence, we must have held that the adverser got *something*. If after five years of nonuse title reverted to the public, neither the adverse nor the prior owner would have any title. At 638-9. (Emphasis added.)

The most unequivocal statement about the effect of the 1939 amendment has been made in *Salt Lake City v. Silver Fork Pipeline Corp.*, 5 P.3d 1206 (Utah 2000). In footnote 19, the Supreme Court explained that "following an amendment of Utah's Water Code in 1939, adverse use that began before 1939 could still ripen into title after the effective date of the Act." Id. at 1221. The Supreme Court cites to *Mitchell v. Spanish Fork West Field Irr. Co.*, 265 P.2d 1016, 1019 (Utah 1954) and *Wellsville* at 460-66 in support of this statement.

Plaintiff argues that footnote 19 is *dicta*, and that it relied on cases that did not specifically hold that the adverse possession right was allowed to ripen if it had been initiated before 1939.

Footnote 19 is *dicta* because the Supreme Court in *Silver Fork* was not deciding the question of ripening rights. However, the pronouncement may be helpful in trying to predict how the Supreme Court would rule on the issue which is before this Court.

Footnote 19 is connected to the text in P46 (paragraph 46, also at 1221) of the opinion. I find it interesting and instructive that the following language is found in the very next paragraph, P47 (also at 1222):

> P47 . . . SFPC failed to prove seven years of continuous, uninterrupted, hostile, notorious, and adverse enjoyment under claim of title, *beginning prior to 1939*, by any party it may legitimately claim as its predecessor-in-interest. (Emphasis added.)

There is an inference to be drawn from this language. The inference is that proof of the requisite possession beginning prior to 1939 could qualify as one of the elements of adverse possession.

Besides, the Supreme Court's reliance on *Mitchell* and *Wellsville* is not misplaced. For example, in *Mitchell*, it was held that since 1939 "the initiation of water rights by this method [i.e., adverse possession] has been precluded by statute." At 1019. Thus, it follows that a right initiated before 1939 could still ripen into adverse possession claim after 1939.

The pronouncements in the *Wellsville* case that support this position have been quoted and analyzed above.

Therefore, the Court finds that the Defendant's right initiated in December of 1936 may still ripen into a full adverse possession claim, provided the Defendant's use meets other necessary elements.

4. Elements of Adverse Possession

To establish the right to use water by adverse possession, the Defendant must show that its use has been continuous, uninterrupted, hostile, notorious, and under claim of right for the period of seven years. See *Wellsville* at 279; *Salt Lake City v. Silver Fork Pipeline Corp.* at 1221.

Defendant submitted the following affidavits to establish the above elements: (1)

Affidavit of Melvin Alvey; (2) Affidavit of Neal Liston; (3) Affidavit of Usher L. Spencer; (4) Affidavit of Gail C. Bailey; and (5) Affidavit of Doyle S. Cottam.

Plaintiff countered with a Motion to Strike those affidavits based on lack of foundation and lack of competency. Specific challenges to the affidavits are as follows:

1. that the affiants born after 1900 testified about facts that occurred in 1875;

2. that the evidence supplied refers to the time period from 1910 to 1930, which is not relevant; and

3. that the statements concerning the time period from 1930 to 1940 are generalizations.

The elements of adverse possession must have been satisfied by the Defendant during the period of 1936 until 1943. Statements concerning adverse use at any other time prior to 1936 or after 1943 are immaterial.

The Affidavit of Melvin Alvey contains one statement in paragraph number 7 concerning the relevant time period. It reads: "Since the early 1930's, maintenance on the Ditch has been performed with mechanized equipment. The Irrigation Company would hire a backhoe or caterpillar out of Panguitch or Salina to rebuild the ditch, whenever it became necessary." I think this statement contains specific information based on personal knowledge of the affiant, who was an active participant in the affairs of the New Escalante Irrigation Company[4]. This

[4] Paragraph 1 of the Affidavit of Melvin Alvey reads: "The following is my statement concerning what is referred to as the "Iron Springs Ditch" . . . and I attest that the knowledge I have attained regarding the existence, purpose and use of the Ditch has been accumulated through . . . my

statement is permitted to stand.

All other affidavits contain no relevant information about the existence and exploitation of the Ditch from 1936 until 1943. The other affidavits will not be considered.

Thus, the presented evidence is insufficient to prove every element of adverse possession claim. The Defendant's Cross Motion for Summary Judgment on adverse possession claim should be denied.

CONCLUSION

The Iron Spring source was properly included in the *Richlands* litigation. The Defendant received sufficient notice, made no claim, and received no rights in the Iron Spring source. The Defendant started adversely possessing the Iron Spring water in 1936. The 1939 amendment to the statute does not preclude the Defendant's adverse possession claim. The Defendant did not produce sufficient evidence to establish all the necessary elements of adverse possession for the purposes of summary judgment.

Therefore, the Plaintiff's Renewed Motion for Summary Judgment is granted on the following issues: (1) that the Defendant was made a party and bound by the general adjudication of the Sevier River in the *Richlands* case; and (2) that the Iron Spring source was properly included in the *Richlands* adjudication. The Plaintiff's Renewed Motion for Summary Judgment

---

numerous years of experience in the matters of the New Escalante Irrigation Company . . . as a Board Member for 43 years, President of the company for 25 years, 10 years as Water Master of said company, and 15 years as Commissioner of Alvey Wash."

is denied on the issue that the Defendant has no claim to the Iron Spring source.

The Defendant's Cross Motion for Summary Judgment is denied on the following issues: (1) that the Defendant acquired diligence rights to the water diverted from the Iron Spring Draw area; and (2) that the Cox Decree did not adjudicate those rights The Defendant's Motion for Summary Judgment is partially denied on the issue of New Escalante's reacquiring rights to Iron Spring water by open, notorious, and adverse use beginning the day after entry of the Cox Decree because the Defendant did not produce sufficient evidence of that. The Motion is partially granted on this issue because the Defendant is permitted to assert its claim of adverse possession and establish the requisite elements at trial.

David L Mower

Digitally signed by David L Mower
DN cn=David L Mower c=US
o=TrustID personal certificate
ou=Utah email=dmower@mstar.net
Reason I am the author of this document
Date 2006.09.26 16:10:44 -06'00'

Date 9/26, 2006

David L. Mower
District Court Judge

Certificate of Notification

On 9/28, 2006, a copy of the above was sent to:

Kay L. McIff, Esq.
THE MCIFF FIRM, P.C.
Attorney for Plaintiffs
225 North 100 East
Richfield, Utah 84701

Richard K. Chamberlain, Esq.
CHAMBERLAIN & ASSOCIATES
Attorney for Plaintiffs
225 North 100 East
Richfield, Utah 84701

Robert A. Peterson
HOWREY LLP
Attorneys for Plaintiffs
170 South Main, Suite 400
Salt Lake City, Utah 84101

Steven E. Clyde
Edwin C. Barnes
Christopher B. Snow
CLYDE SNOW SESSIONS & SWENSON
Attorneys for Defendant
201 South Main Street, 13th Floor
Salt Lake City, Utah 84111-2216

X